McClain & Co., Inc. *and* Craig H. Livingston. Case 22–CA–029792

August 31, 2012

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HAYES AND BLOCK

On October 17, 2011, Administrative Law Judge Eleanor MacDonald issued the attached decision. The Respondent filed exceptions and a supporting brief, the Acting General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified below and to adopt the recommended Order.

1. We agree with the judge that the Respondent violated Section 8(a)(1) of the Act on July 21 and August 30, 2010,[2] by threatening employees with loss of work for engaging in protected concerted activity. These threats were contained in emails sent by Project Manager Joe Ferrer to the Respondent's employees. Both emails indicated that if employees complained about work-scheduling assignments, they would be taken off the schedule—i.e., they would not work. The record establishes that Ferrer's emails referred to the employees' ongoing, concerted protest of the Respondent's scheduling practices. Specifically, a group of senior employees perceived that they were being scheduled for fewer shifts than newer employees. As the judge found, the senior employees frequently discussed their concerns about this perceived favoritism with each other, and they repeatedly complained about the situation to various management officials. These facts alone are sufficient to establish the protected, concerted nature of the employees' complaints. See *Salisbury Hotel*, 283 NLRB 685, 686–687 (1987) (finding concerted activity where employees complained among themselves about new lunch policy and most took complaint to management, despite absence of explicit agreement to act together).[3]

The concerted nature of the senior employees' complaints about their shift assignments is further confirmed by employee Danny Brattoli's telephone call to Dan McClain, the Respondent's owner. Prior to the call, Brattoli told other employees that he planned to raise the issue of scheduling assignments with McClain. During the call, he told McClain that other employees shared his concerns about scheduling assignments. And, after the call, Brattoli reported McClain's promise to investigate the issue to the other employees. Although Brattoli told McClain that he was only calling for himself, this fact does not undermine the conclusion that he was nevertheless bringing a "truly group complaint" to McClain's attention. *Meyers Industries*, 281 NLRB at 887. In addition, given Brattoli's express reference to other employees sharing his concern, McClain knew or had reason to know as much. See *Approved Electric Corp.*, 356 NLRB 238, 239 (2010) (employee's statement to supervisor that "the guys" were upset about not being paid was sufficient to show that employer knew or had reason to know that employee's complaints were concerted). As the employees' complaints about scheduling assignments constituted protected concerted activity, and as Ferrer's emails threatened employees that they would lose work if they continued to engage in this protected activity, the emails violated Section 8(a)(1).

Moreover, Ferrer's emails violated Section 8(a)(1) regardless of whether the employees had already engaged in protected concerted activity. The Board has held that an employer violates the Act by seeking to prevent *future* protected activity. See, e.g., *Parexel International, LLC*, 356 NLRB 516, 519 (2011), and cases cited therein. Specifically, the Board has found that an employer violates Section 8(a)(1) by threatening employees with adverse action if they engage in protected concerted activity. See *SKD Jonesville Division L.P.*, 340 NLRB 101, 103 (2003); *Keller Ford*., 336 NLRB 722, 722 (2001), enfd. 69 Fed. Appx. 672 (6th Cir. 2003); and *Monarch*

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] All dates hereafter are in 2010.

[3] Employee Frank Bruno testified that he heard employees complaining to Supervisor Al Ladd about their shift assignments. Employee Ivan Casiano similarly testified that he heard employee David DeCarlo, in the presence of several other employees, protest to Ladd that new hires were receiving an "unfair advantage" in shift assignments. Based on Bruno's and Casiano's testimony, the judge found that the employees raised the shift assignment issue to management "as a group." However, as argued by the Respondent on exceptions, neither employee testified that the employees complained as a group. Accordingly, we do not rely on the judge's "group" presentation findings in concluding that the employees were engaged in protected concerted activity. Instead, the senior employees' discussions among themselves about the assignment issues and their presentation of these issues to management, even if on an individual basis, are sufficient to establish the concerted nature of their activity. See *Salisbury Hotel*, supra; see also *Mike Yurosek & Son, Inc*., 306 NLRB 1037, 1038–1039 (1992), enfd. 53 F.3d 261 (9th Cir. 1995); and *Meyers Industries*, 281 NLRB 882, 887 (1986), affd. 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

Water Systems, 271 NLRB 558, 558 (1984). Consistent with this precedent, whether or not the senior employees had actually concertedly complained to management about scheduling assignments, Ferrer's emails threatening loss of work if they concertedly complained in the future violated Section 8(a)(1), as the emails would tend to chill the employees' exercise of their Section 7 right to discuss and protest scheduling assignments.[4]

2. We also agree with the judge's application of *Wright Line*[5] to determine that the Respondent violated Section 8(a)(3) and (1) by laying off traffic control technicians Frank Bruno, Danny Brattoli, and Ivan Casiano on August 25 (Bruno) and August 26 (Brattoli and Casiano).[6] Under *Wright Line*, the General Counsel bears the initial burden to show that the employees' union activity was a motivating factor in the Respondent's selection of them for layoff.[7] See *Bruce Packing Co.*, 357 NLRB 1084, 1086 (2011). The General Counsel satisfies this initial burden by showing that the alleged discriminatees engaged in union activity, the Respondent had knowledge of the activity, and the Respondent bore animus toward the activity. See, e.g., *Fremont Medical Center*, 357 NLRB 1899, 1902 (2011). The burden then shifts to the Respondent to demonstrate that the same adverse action would have occurred even in the absence of the union activity. See *Wright Line*, supra at 1089.

Here, there is no dispute that Brattoli and Casiano engaged in union activity by attending a meeting with officials from Teamsters Local 210 (the Union) on August 25. The Respondent's knowledge of that activity is shown by Yard Manager Al Ladd's September 7 comment to Bruno that he knew that "you guys" attended the union meeting and that "everything got back to Virginia," i.e., to the Respondent's main office, and by association, to Owner McClain. The Respondent admits that Ladd, in consultation with Ferrer, selected employees for layoff. The Respondent's knowledge of the employees' union activity can additionally be inferred from the suspicious timing of the layoffs and, as explained below, the pretextual reasons given for them. See *Montgomery Ward & Co.*, 316 NLRB 1248, 1253 (1995), enfd. mem. 97 F.3d 1448 (4th Cir. 1996).

The record also contains ample evidence of antiunion animus. In this case, four of the five employees who attended the union meeting were laid off within a day of the meeting. The timing of the layoffs, under these circumstances, is strong evidence of antiunion animus. See, e.g., *McClendon Electrical Services*, 340 NLRB 613, 613 (2003) (discharge the day after participating in lawful picketing supports a finding of unlawful motive). Further, the purported reason for the layoffs—a lack of work—is belied by the Respondent's hiring of new traffic control technicians in the succeeding weeks. As such, the reason is pretextual and, thereby, constitutes evidence of animus. Evidence of animus is further shown by (1) Ladd's comment to employee David DeCarlo that if the employees formed a union, the Respondent would probably close the Lyndhurst location; and (2) the Respondent's deviations from its handbook procedures in making the layoffs.[8] Based on the foregoing evidence, we agree with the judge that the Acting General Counsel met his initial *Wright Line* burden.

Turning to the Respondent's rebuttal burden, the record does not support the Respondent's claim that the layoffs were occasioned by a lack of work.[9] In addition to the Respondent's hire of new traffic control technicians within weeks of the layoffs,[10] it engaged in no further layoffs due to a lack of work until November and December. As this proffered reason for the layoffs is pretextual, the Respondent by definition cannot meet its burden under *Wright Line*. See *Limestone Apparel Corp.*, 255 NLRB 722, 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982). Accordingly, we agree with the judge that the Respondent violated Section 8(a)(3) by laying off employees Bruno, Brattoli, and Casiano.

3. We also adopt the judge's determinations that the Respondent violated Section 8(a)(1) by interrogating Bruno and by creating the impression that the employees' union activities were under surveillance. On September 7, Bruno approached Ladd in the equipment yard to protest his layoff. Ladd informed Bruno that "Virginia" (i.e., the Respondent's main office) was responsible for the layoff decision. Bruno continued his protest, citing his good work history with the Respondent. Ladd

[4] Member Hayes finds it unnecessary to rely on this additional basis in finding that Ferrer's emails violated the Act.

[5] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[6] The Respondent has not excepted to the judge's conclusion that it violated Sec. 8(a)(3) and (1) by laying off Bruno.

[7] The judge inadvertently mischaracterized *Wright Line* as a "but-for" test.

[8] The Respondent's employee handbook lists a number of factors to be considered in selecting employees for layoff. Regional Manager Matt Pasquale admitted he did not consider these factors, and Ferrer, in his testimony, mentioned only three factors he considered and did not explain how he applied them in selecting the employees for layoff.

[9] The Respondent claims certain other reasons for selecting Brattoli and Casiano for layoff, but in both cases the underlying reason for the layoff was the supposed lack of work. In any event, as the judge thoroughly explained, the other considerations the Respondent cites do not establish that it would have laid off Brattoli and Casiano in the absence of their attendance at the union meeting.

[10] The Respondent attempts to explain this circumstance in its brief, but in doing so identifies no record evidence that supports its explanation.

responded that the "union meeting you guys went to . . . sure [ ] didn't help it." He then asked Bruno, "There's another one [union meeting] on the eighth, right? Tomorrow?" Bruno replied, "I don't know nothing. I don't know what you're talking about." When Bruno then sought to clarify whether the "supposed[] union meeting" was the reason he was laid off, Ladd replied, "Everything got back to Virginia."

On September 13, Bruno visited the office of Regional Manager Matthew Pasquale to ask why he had been laid off. Bruno told Pasquale that Ladd said Bruno had been laid off for attending "some kind of union meeting." Pasquale responded by asking, "Did you go to a union meeting?" When Bruno replied that "[i]t wasn't a union meeting," Pasquale asked, "What was it?" Bruno stated that it "was a bunch of guys talking" and that Ladd was "telling me that that's the reason why [Bruno was laid off]." Pasquale responded, "That could play into it." He then told Bruno that if Bruno was "so jacked on the union, go join the union." Pasquale reiterated, when Bruno asked whether going to a union meeting was the reason he was no longer working, that it "[m]ight be part of it." Later in the conversation, Bruno repeated that the meeting wasn't a union meeting, and Pasquale responded by asking Bruno whether it "[w]as a union guy" who conducted the meeting.

In determining whether an interrogation is coercive in violation of Section 8(a)(1), the Board applies the totality-of-circumstances test set forth in *Rossmore House*,[11] which examines the following factors: (1) the background, i.e., whether the employer was hostile toward or discriminated against union activity; (2) the nature of the information sought, e.g., did the interrogator appear to be seeking information on which to base taking action against the employee; (3) the identity of the questioner, i.e., how high was the interrogator in the employer's hierarchy; (4) the place and method of the interrogation, e.g., was the employee summoned to the boss' office; (5) the truthfulness of the employee's reply, e.g., did the employee attempt to conceal his or her union activity; and (6) whether the interrogated employee was an open and active union supporter. See *Camaco Lorain Mfg. Plant*, 356 NLRB 1182 (2011), and cases cited therein. Taken as a whole, these factors support the judge's findings that Ladd's and Pasquale's questions were unlawfully coercive.[12]

First, the questioning by both Ladd and Pasquale occurred against a background of contemporaneous unlawful activity directed at Bruno—his layoff for attending the August 25 union meeting. Indeed, both officials told Bruno during their respective meetings that his union activity was a reason for his layoff. Interrogations accompanied by contemporaneous unfair labor practices strongly support a finding that questioning was unlawfully coercive. See *Seton Co*., 332 NLRB 979, 982 (2000). Second, the nature of the information sought by Ladd and Pasquale indicates the unlawfulness of their inquiries. Ladd, having told Bruno that going to the August 25 union meeting "didn't help" his employment situation, asked him whether another union meeting was scheduled the next day. Pasquale asked Bruno if he had attended the August 25 meeting and whether a "union guy" conducted it. Both interrogations sought to confirm for the Respondent the unlawful basis for its layoff of Bruno. Cf. *Stevens Creek*, 353 NLRB at 1295 (unlawful purpose of interrogations was to determine who to discharge for attending union meeting). Next, Bruno responded untruthfully to Ladd's and Pasquale's questions. He told Ladd that "I don't know nothing" when asked if another union meeting was being held the next day and told Pasquale that it was not a union meeting that he attended but, instead, was just a "bunch of guys talking." See *Camaco Lorain*, 356 NLRB at 1183 (untruthful response to interrogation in effort to conceal union activity evinces coercive nature of questioning). Finally, Bruno was not an open union supporter. See id.; and *La Gloria Oil & Gas Co*., 337 NLRB 1120, 1123 (2002) (questioning employees not known to be open union supporters about union activity found coercive), affd. 71 Fed. Appx. 441 (5th Cir. 2003).[13] For all these reasons, we affirm the judge's finding that the Respondent violated Section 8(a)(1) by interrogating Bruno on September 7 (by Ladd) and September 13 (by Pasquale).

We further find, in agreement with the judge, that Ladd's September 7 comments to Bruno unlawfully created an impression that the employees' union activity was under surveillance. The Board's test for determining whether an employer has created an unlawful impression of surveillance is "whether, under all of the relevant circumstances, reasonable employees would assume from the statement in question that their union or protected activities had been placed under surveillance." *Frontier Telephone of Rochester, Inc*., 344 NLRB 1270, 1276

[11] *Rossmore House*, 269 NLRB 1176, 1178 (1984), enfd. sub nom. *HERE Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

[12] "It is not essential that every *Rossmore* factor be established to find an 8(a)(1) interrogation." *Stevens Creek Chrysler Jeep Dodge*, 353 NLRB 1294, 1295 fn. 9 (2009), affd. and incorporated by reference 357 NLRB 633 (2011); see, e.g., *Demco New York Corp*., 337 NLRB 850, 851–852 (2002).

[13] Bruno's attendance at the union meeting on August 25 does not constitute evidence that he was an open and active union supporter.

(2005), enfd. mem. 181 Fed. Appx. 85 (2d Cir. 2006); accord: *Camaco Lorain*, supra, 356 NLRB at 1183.

As the Board explained in *Stevens Creek*, supra, when an employer tells employees that it is aware of their union activities, but fails to tell them the source of that information, it violates Section 8(a)(1) "because employees are left to speculate as to how the employer obtained the information, causing them reasonably to conclude that the information was obtained through *employer* monitoring." 353 NLRB at 1296 (emphasis in original). Failure to identify the source of the employer's information about union activity is the "gravamen" of an impression-of-surveillance violation. *North Hills Office Services*, 346 NLRB 1099, 1103 (2006). Here, Ladd informed Bruno that he was aware of the August 25 union meeting and a second union meeting scheduled for the next day. Ladd did not identify another employee as the voluntary source of this information or indicate that he learned of the meetings through lawful means. Nor is there evidence that the August 25 meeting was an open or publicized event. Although Bruno and other employees who attended the August 25 meeting discussed it with employees who did not attend, Bruno did not mention the meetings to management, nor was he aware that other employees had done so. Thus, unlike in *Frontier Telephone*, supra, Bruno had no basis to assume that Ladd knew through lawful means of the union activity. Instead, Bruno was left to speculate, and reasonably conclude, that Ladd obtained his information through unlawful employer monitoring. Moreover, Ladd's comment that "[e]verything got back to Virginia" reasonably suggested to Bruno that the Respondent was closely monitoring the degree and extent of the employees' union activities at the highest corporate level. See *Flexsteel Industries*, 311 NLRB 257, 258 (1993); and *United Charter Service*, 306 NLRB 150, 151 (1992). In these circumstances, we agree with the judge that the Respondent violated Section 8(a)(1).[14]

[14] Contrary to his colleagues, Member Hayes would not find that Ladd's comments created an impression of surveillance. Ladd told Bruno that he (Ladd) had heard about the meeting from other people. Within a day of the union meeting, Bruno informed three employees who had not attended the meeting what had happened there. The day after the meeting, Bruno received a call from his cousin, a fellow employee, who had not been invited to the meeting but was nevertheless aware of it. Moreover, Brattoli indicated that word of the meeting spread so rapidly that "everyone"—including management—knew about it (including the identity of the attendees) by the next morning. Finally, the leader of the meeting encouraged attendees to tell other employees about the meeting and about plans for a second meeting. Thus, the meeting had been a topic of open discussion 10 days before Ladd made his statement to Bruno. Under these circumstances, Bruno would not reasonably assume from Ladd's statements that the employees' union activities had been placed under surveillance. See, e.g., *North Hills Office Services*, 346 NLRB at 1103–1104. Ladd's remark that "everything got back to Virginia" merely indicated that this generally known information was conveyed to management, not that management had acquired the information through surveillance.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, McClain & Co., Inc., Lyndhurst, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Bernard S. Mintz, Esq., for the General Counsel.
Douglas S. Zucker, Esq. and *Kathryn Van Deusen Hatfield, Esq. (Bauch, Zucker, Hatfield LLC),* of Springfield, New Jersey, for the Respondent.
Craig H. Livingston, Esq. (Livingston, Siegel, DiMarzio, LLP), of Nutley, New Jersey, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ELEANOR MACDONALD, Administrative Law Judge. This case was heard on May 24 and June 2, 2011, in Newark, New Jersey, and New York, New York. The complaint alleges that Respondent, in violation of Section 8(a)(3) and (1) of the National Labor Relations Act (the Act), threatened its employees with loss of work if they complained concertedly, created the impression that its employees' protected activities were under surveillance, interrogated employees about their union activities, and discharged its employees Frank Bruno, Ivan Casiano, and Daniel Brattoli. Respondent denies that it has engaged in any violations of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent on July 29, 2011, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, with an office and place of business in Lyndhurst, New Jersey, is engaged in the rental of under-bridge access and aerial equipment, and the provision of traffic control services. Respondent annually purchases and receives at its facility goods and services valued in excess of $50,000 directly from suppliers located outside the State of New Jersey. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that Teamsters Local 210, International Brotherhood of Teamsters is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR PRACTICES

A. Background

McClain & Co. establishes traffic patterns for work zones on highways and bridges so that inspections and work on bridges and signs may take place without injury to either the workers or the driving public. Respondent is a subcontractor to the engi-

neering firms that are hired to perform the actual inspections and work. The contracts between McClain and the engineering firms specify the equipment to be used and the traffic control duties of the Company. These contracts generally have a 2-year term; for each specific traffic control job, Respondent may get from 1 week to a few days' notice. There are frequent cancellations due to weather and other factors. Respondent also performs noncontract work for engineering firms.

The headquarters of McClain is in Virginia.

In Lyndhurst, New Jersey, McClain maintains an office and a yard for storing and maintaining equipment. These locations are not contiguous. The Company also has a terminal in Danbury, Connecticut.

The following individuals are admitted to be supervisors and agents of Respondent within the meaning of Section 2(11) and (13) of the Act:

Matthew Pasquale	Regional Manager
Joseph Ferrer	Project Manager
Alan Ladd	Equipment & Yard Supervisor

Certain of Respondent's employees hold a traffic control technician (TCT) certification. To be certified as a TCT a person must be trained in setting up traffic patterns and performing safe traffic control.

Each crew sent out to perform a job has a team leader. An employee who is chosen to be team leader on one job would not necessarily be the team leader for the next job to which he was assigned. The team leader is in charge of the crew. He is responsible for informing his crew of the time to report to the yard for the job and he must get the trucks equipped and ready to leave. The team leader has no input as to how a job is staffed.

On May 9, 2011, Respondent entered into a Consent Agreement with the Regional Director for Region 22 of the National Labor Relations Board (the Board). The Consent Agreement, approved and so ordered by the United States District Court, required Respondent to offer Frank Bruno, Daniel Brattoli, and Ivan Casiano opportunities to return to work pending final disposition of the instant case by the Board.

The company handbook sets forth procedures to be followed in a layoff:

> When a reduction in force is necessary or if one or more positions are eliminated, employees will be identified for layoff after evaluating the following factors:
>
> 1. Company work requirements;
>
> 2. Employee's abilities, experience, and skill;
>
> 3. Employee's potential for reassignment within the organization; and
>
> 4. Length of service.

B. Testimony of Employees

Frank Bruno

Frank Bruno worked for McClain & Co. from December 2007, until August 25, 2010. Bruno was certified as a TCT. On his last day of work, Bruno had the greatest seniority of any TCT employed in Lyndhurst. Bruno holds a commercial driver's license (CDL); he is trained to operate an under bridge inspection truck (UB truck), and he is trained to operate high rail equipment to check bridges that span railroad tracks. Bruno usually works from the Lyndhurst terminal. He has also worked from the Danbury terminal and in Maryland. He has worked in various New York State regions including the boroughs of New York City, Nassau, Suffolk, Westchester, and Putnam Counties and in the areas around Utica and Binghamton, New York.

Bruno testified that for each job to be performed by the Company Project Manager Ferrer would send an email to the team leader for that job specifying a list of equipment and naming the employees assigned to the job. The team leader had the responsibility to call his crewmembers to tell them what time they should be in the yard before leaving for the job. All employees report to the yard before going out to work and they return to the yard after work every day.

Around February or March 2010, McClain appointed new management in Lyndhurst. Ladd became the yard manager and Pasquale took over as regional manager. Bruno testified that conditions improved at this time: payments for prevailing wage rate jobs were now made according to legal requirements and hours of work were adjusted to conform to Department of Transportation (DOT) regulations.[1] Bruno testified that conditions deteriorated when Ferrer became project manager in June 2010. Bruno said that favoritism became a factor in job assignments. New employees were hired and senior employees noticed that their hours or work decreased. Bruno said he had been working five shifts a week but after Ferrer came on the job he was working only three or four shifts per week.

The new management team held a meeting with employees in July 2010 to announce new rules about writeups. Ladd, Ferrer, and Pasquale attended the meeting in the yard. Bruno testified that Ladd told the employees that as of that day the slate would be wiped clean of prior writeups; whatever happened in the past was in the past and they would start fresh from that day. As of the day of the meeting, Ladd explained, three writeups would equal a termination. Ladd also told the employees that the team leader on a job must arrive at the yard 30 minutes prior to the time set forth in the email which assigned the job, and laborers must report 15 minutes before the set time. At the meeting, Ladd distributed a notice reiterating some of the points made in his remarks to employees. The notice additionally urged employees to perform pretrip and posttrip inspections, instructed employees to top off the fuel on the way back to the yard, and told employees not to leave garbage or traffic cones in their equipment at the end of the day.

Bruno testified that senior employees discussed their concerns about favoritism and decreased hours among themselves. Then, Bruno and others complained to Ladd in the yard.[2] Employees also brought their complaints to Ferrer, but Ferrer was hard to contact because he was in the office. Eventually, Ladd expressed annoyance about the employees' complaints; Ladd

[1] At some point a DOT inspection had taken place and it was found that employees were working double or triple shifts, thereby violating restrictions on consecutive hours worked.

[2] Bruno witnessed other employees voicing their complaints to Ladd.

did not prepare the employees' schedules and he told them to speak to Ferrer.

On July 21, 2010, Ferrer sent an email to all employees. The note stated, in relevant part:

> I have been getting numerous complaints from Al [Ladd] that some, NOT ALL of you are complaining to him about your shifts and who's doing what and getting what. I'm not going into the topic of how you should mind your own business and stuff like that. All I have to say is some of you aggravate him and then he aggravates me, so easiest way to remedy this is . . . . 1. you aggravate him. 2. He aggravates me. 3. I take you off schedule. Simple as that. He has nothing to do with the schedule so leave him out of it. You have a question, ask me. If I don't answer, keep trying. For those who analyze the schedule and notice an error by all means let me know via email or text and I will correct it, but don't call me about this guy doing this and that guy doing that, I need this, and I need that. I will not cater to your needs, so don't ask me to. And as always, please feel free to contact your Regional Manager if you are not cool with what's going on . . . . Have a nice day. (No changes have been made to the original as written by Ferrer.)

Also in July 2010 Bruno was told by coworker Daniel Brattoli that Brattoli had called the company headquarter in McClain, Virginia, and had left a message on Owner Daniel McClain's voice mail about the employees' complaints. A few weeks later, Bruno also left a message on Daniel McClain's voice mail. McClain did not return Bruno's call.

On August 30, 2010, Ferrer sent another email to employees. The note stated in relevant part:

> Hi everyone, just want to let everyone in on some changes made as of late. Al [Ladd] no longer gets a copy of the schedule. . . . This is coming from Va. Apparently, a call may have been made down there and some complaints were made about certain things that will not be mentioned so please don't ask. Also effective today, no one is allowed to come up to the office. If you have a payroll issue, please either call or email Chrystal with your concerns. If it's a question directed towards me, either call, e mail or wait at the yard. If anyone comes unannounced to the office, they will be taken off the schedule. Sorry it has to come to this guys, but it's out of my hands and I have to follow the rules given to me. . . .

On August 13, 2010, Bruno had an accident with an arrow board.[3] Bruno filed an accident report which stated: "I was going back to the yard from the back road when I heard a pop. I turned—the truck pulled to the right. I turned the truck and hit the curb with the arrow board. The wheel must have hit the curb and bounced up and flipped the [arrow board] on its side. [The] side of arrow board has damage on the left front corner, trailer not damaged." Bruno included a diagram in his accident report: the diagram showed damage in the upper left corner of the arrow board. Bruno said that his vehicle had a blown tire. Bruno testified that the accident occurred when he took a drink of water and began to choke. He came too close to the curb and heard a pop when the tire hit the curb. The arrow board flipped over when he pulled the truck away from the curb. Bruno said he was going 25 miles per hour when the accident occurred. He denied that there was extensive monetary damage to the arrow board.

Bruno called Ladd who dispatched an employee with a spare tire. Bruno spoke to Ladd in the yard and offered to come in on his own time to fix the arrow board. Bruno testified that he asked Ladd whether he would he would be written up for the damaged arrow board and Ladd replied, "Don't worry about it." Bruno has had experience repairing arrow boards. He testified that it would take 1 or 2 hours to repair the damaged board. One would straighten the metal and put in some screws or rivets. Bruno testified that arrow boards are damaged all the time and that flat tires are common at the company. Bruno recalled that in 2010 employee Charles DeCarlo rolled an arrow board due to excessive speed; DeCarlo was not discharged.

When Bruno reported for his next shift after August 13 he found a writeup on the bulletin board.[4] The document was signed by Project Manager Ferrer. Although the document has blocks to indicate whether it was the first, second, or final warning, none of the blocks was checked on this sheet. Instead, lower down on the warning sheet, two blocks were checked indicating "substandard work" and "other offenses: willful disregard for equipment." A description of the infraction was included: "negligent driving and unsafe movement, extensive monetary damage." The consequence of further infractions was stated: "Another infraction will result in termination."

Bruno asked Ladd why he had been written up and Ladd replied that Ferrer had done it.

Bruno worked steadily from the date of the accident until August 25, 2010.

At 7:30 p.m. on August 25, Bruno attended an informal meeting in the Meadowlands Diner with a representative of Teamsters Local 210 and two employees from a company called Highway Technologies.[5] Bruno was invited to the meeting by McClain employee Mike Alvarez. Other McClain employees at the meeting were Daniel Brattoli, Ivan Casiano, and Alex Lopez.[6] The men discussed various issues including that McClain was not paying its employees correctly and that they had no job security and no representation. Alvarez took some Local 210 authorization cards but no cards were signed at the meeting. There was discussion about asking other McClain employees if they were interested in a union. The next meeting was tentatively scheduled for September 8.

The day after the August 25 meeting Frank Bruno's cousin, Dominic Bruno, also an employee of McClain, telephoned Frank Bruno and asked what he was doing. Dominic Bruno

[3] An arrow board consists of a trailer with a lighted arrow sign to direct traffic in a certain direction.

[4] The document is entitled "Employee Warning Notice," but all the witnesses referred to this type of document as a "writeup."

[5] The Teamsters' representative was Local 210 Vice President Bob Bellick.

[6] Frank Bruno had invited other employees to the meeting but they had not attended. After the meeting, he told them what had been discussed.

told Frank Bruno to leave the Union alone or he would lose his job.

Bruno did not work for McClain after August 25. He testified that except for Alex Lopez none of the other McClain employees present at the meeting worked after they attended the meeting with Local 210. This testimony is borne out by Respondent's records.

Bruno tried numerous times to telephone Project Manager Ferrer to ask why he was not working. He eventually obtained an appointment to meet with Ferrer after Labor Day, on September 7, 2010. Bruno tape recorded the conversation.[7] Bruno asked Ferrer why he was not getting any work from McClain.[8] Ferrer said, "They think that you have two strikes against you . . . for that equipment damage that happened a couple of weeks ago." When Bruno asked how that could be two strikes when it was one incident, Ferrer replied, "You've gotta talk with Al [Ladd]." Bruno pointed out that Ferrer had written him up, not Ladd. Ferrer said, "That's true." After Bruno protested that he should only get one writeup for one incident and that Ladd had said he would not be written up at all, Bruno asked if he was not working because he had two strikes against him. Ferrer replied, "No, it's not necessarily you don't work because of that, Just—Because they said to give you a pink slip so you don't work." Ferrer said he was told from "Virginia. They said to give you the pink slip. Technically, since you had a CDL . . . you're held to a higher standard." Bruno protested that he was not being paid extra for possessing a CDL. Then Bruno asked why, if he was getting a pink slip, he was on schedule to go away the week before.[9] Ferrer said he did not know, he was trying to get Bruno on, but . . . . Bruno then protested that Ferrer had put him on a schedule when Ferrer knew that Bruno was not able to go away because he had a doctor's appointment that could not be changed. Bruno complained that he was laid off when half the men were getting high and when men hired very recently were working but he was not. Ferrer advised Bruno to speak to Regional Manager Matthew Pasquale but Bruno said that Pasquale was not around.

Next, Bruno went to speak to Equipment and Yard Supervisor Alan Ladd.[10] Bruno asked Ladd why he was written up for the arrow board incident, and apparently was charged with two writeups for the same incident, when Ladd had informed Bruno that he would not be written up at all. Ladd replied that Ferrer had written the warning. Bruno protested that he should not be charged with two writeups for one incident and further protested that he should not be laid off because other employees had many more writeups and some had done serious damage. Ladd told Bruno that "Virginia went through and picked out six fucking people. There's six people that got laid off." After Bruno repeated his earlier points, Ladd said, "I have nothing to fucking do with any of this. This is Virginia. This is Virginia. Every fucking thing that's going on now is Virginia." Bruno kept repeating his points about the unfairness of not working when recent hires were still getting work and the unfairness of being held to a higher standard but not receiving higher pay for the possession of a CDL. Bruno again asked Ladd who laid him off and Ladd again said that it was "Virginia." Ladd said there was a new system that required "us to submit that schedule to Virginia, and they're going to fucking approve it." After some more complaints from Bruno, Ladd said, "I'm sure the union didn't fucking help it." When Bruno asked, "What union" Ladd replied, "The union meeting you guys went to. That didn't help it." Bruno feigned ignorance of a union meeting and Ladd said, "Well then people are lying. . . . Whoever went to the meeting. There's another one on the eighth, right? Tomorrow?" Bruno asked Ladd whether he was laid off because the "supposedly union meeting." Ladd replied, "Everything got back to Virginia."

On September 13 Bruno spoke to Regional Manager Pasquale in his office.[11] He asked Pasquale why he was not working. Pasquale replied that it was "pretty much" because of the accident and "there has not been a lot of work." Bruno protested that there were men who had been hired a few weeks ago who were working but that Ferrer had told him he might not work for a few months. Pasquale said, "Possibly not." Bruno asked whether Virginia or Pasquale had made the decision. Pasquale replied, "It's pretty much me." After some discussion of Bruno's August 13 accident, Bruno said that Ladd told him "some other story about some kind of union meeting, that I went to the union meeting." Pasquale asked him, "All right. Did you go to a union meeting?" When Bruno protested that it was not a union meeting Pasquale asked, "What was it?" Bruno replied, "It was a bunch of guys talking" and that Ladd is "telling me that that's the reason why." Pasquale affirmed this, saying, "Okay. That could play into it." When Bruno complained that no one was giving him answers Pasquale replied, "If you're so jacked on the union, go join the union." Bruno again asked Pasquale, "So that's why I'm not working?" and Pasquale repeated, "Might be part of it." Pasquale then advised Bruno to file for unemployment. After some discussion Bruno reverted to his complaint that he was getting a runaround when he tried to find out who made the decision that he would not work and he raised the idea that going to hear what the union representative had to say affected his job. In response, Pasquale asked him, "Was it a union guy?" Bruno said yes, but protested that he had not signed a card and asked what he should do. Pasquale told him to sign up for unemployment. Then Bruno asked Pasquale whether the decision came from him or from Virginia, and Pasquale said it was from him.[12]

On cross-examination, Respondent's counsel questioned Bruno about his involvement in certain incidents, all of which

[7] As will be seen below, Bruno tape recorded three conversations with management. At the instant hearing, the parties agreed on the contents of the typed transcripts of the three taped conversations and these were entered into evidence.

[8] The transcript is GC Exh. 8b.

[9] Apparently to an out of town assignment. Bruno testified that he was not actually placed on a schedule, but he was asked whether he could go upstate to work.

[10] The transcript of this conversation is GC Exh. 8a.

[11] The transcript of this conversation begins on p. 13 of GC Exh. 8a.

[12] Bruno testified that until he was let go no company official had told him that employees who had a CDL were held to a higher standard. I note that no company witness testified that employees had actually been informed that if they possessed a CDL they were held to a higher standard.

took place before the July meeting where Ladd told the employees that as of that day the slate was wiped clean and three writeups would mean termination. In April 2010, Bruno filed an accident report after he moved into the right lane on the Belt Parkway to avoid a car and some equipment was damaged by a low bridge. However, Bruno acknowledged that the equipment should have been stowed in a different way. He was not written up or warned for this event. On May 25, 2010, Bruno was given a "first warning" by Ladd for bringing a truck back to the yard with branches attached to the equipment. The consequence of further infractions was stated to be "loss of job." Also on May 25, 2010, Bruno was given a "second warning" by Ferrer when a customer complained that a job for which Bruno was the team leader was set up too late and took too long. The notice said, "third infraction will result in loss of job." Bruno explained that he was not given enough equipment and manpower to perform that job.[13] He had been told that the job involved a single lane closure, but the customer informed Bruno that it was a double lane closure. Bruno testified that after he complained to management about the inadequate equipment and manpower, additional trucks and men were assigned and the men were given gas cards so that the trucks could be fueled before being returned to the yard after the job. On the first day of the job, Bruno said, the trucks had to be fueled on the way to the work location. Bruno also testified about some damage reports he had filed including one where two cars involved in an altercation on Staten Island damaged company equipment, and another report where a car ran into the back of a company truck and damaged an arrow board. He was not given warnings for these events.

On cross-examination, counsel for Respondent tried to get Bruno to admit that his TCT certification had expired. Bruno was unaware of this purported fact. I note that Respondent introduced no evidence that any TCT certification would expire at a date certain nor did Respondent show that Bruno's TCT certification had in fact expired. As described above, Bruno was reinstated pursuant to the Order of the District Court; the company has never raised an issue with respect to his TCT.

Ivan Casiano

Ivan Casiano worked for McClain & Co. from March 10, 2009, until August 25, 2010. He was hired as a TCT, he possesses a CDL and he is qualified to operate high rail equipment and a bucket truck to access high locations. Casiano recalled that initially employees were not paid correctly for prevailing rate work. Regardless of the hours they actually spent on the job, the employees were only paid the correct prevailing rate amount for 4 hours; they received a lower base rate for the rest of the worktime.

After Casiano had worked as a TCT for about 1 year, Ladd asked Casiano to be his helper in the yard. Casiano demurred because he was not trained in repair work, but Ladd said he would train him. Ladd told Casiano that if he did not care for the yard repair work he could go back to his TCT job on the road. Casiano worked for Ladd in the yard from April until the end of June 2010 when he decided to leave the yard; Casiano believed that he was not mechanically inclined. Casiano then returned to his TCT position.

Casiano testified that the company had about 8 to 11 arrow boards. They were in a very used condition and they were often bent, torn, and scratched. Casiano helped repair the arrow boards in the yard.

Casiano testified that there had been about 23 TCT employees at the company but that a spate of new hires increased that number to 35. In May 2010, Casiano heard David DeCarlo, one of the team leaders, complain to Ladd that the new hires were getting more work on prevailing rate shifts than the men who had seniority. DeCarlo also complained that the work was not being paid correctly. He asked Ladd if this would be going on if there were a union at the company. A few other employees were in the yard at this time. Ladd said a union would not do anything, just take their dues. Ladd added the comment that if the men did unionize Dan McClain would most likely pack up and run the operation out of the Connecticut location. Casiano also complained to Ladd that new employees were working more days a week than he was getting and Casiano heard other employees complain to Ladd about this issue. Ladd's reply was always that if the employees were not happy they should seek employment elsewhere. Brattoli told Casiano that he had made a call to Daniel McClain complaining that senior people were not getting enough work.

Casiano testified that a mandatory employee meeting was held in the yard in July 2010. Ladd, Ferrer, and Pasquale were present. Ladd spoke for about 45 minutes. Among other things, he said that disciplinary matters taking place prior to the date of the meeting would be "a wash." The slate would be wiped clean for all employees. Ladd said as of that day three writeups would equal a termination.

Casiano attended the August 25, 2010 meeting with Local 210 at the Meadowlands Diner. Other employees present were Michael Alvarez, Frank Bruno, Danny Brattoli, and Alex Lopez. The followup meeting on September 8 did not take place because of the five employees who attended in August, the only man still working was Alex Lopez.

Casiano did not get any work after August 25. Although the employees had been warned not to complain about lack of work Casiano decided to contact Ferrer after he had not been given work for 7 days. Casiano sent a text message to Ferrer complaining that he was not working and Ferrer told him that he should apply for unemployment.

On cross-examination, Casiano testified that he had an accident in the yard in May or June 2010 while moving a bucket van during a rain storm when he ran into a tree and dented the van. Casiano was not disciplined for this accident as he had not been negligent. On July 6, 2010, Casiano was given a written warning by Ferrer for returning a pickup truck to the yard with 20 cones. Ferrer wrote that the cones should have been removed when the vehicle was returned to the yard. Casiano wrote his explanation that the cones were in the vehicle when it was issued to him for departure and he returned it in the same condition. The warning notice was not marked as a first, second, or final warning. Ferrer added the comment that "Further infractions can/and will result in termination."

[13] The team leader has no input on staffing or equipment assigned to a job.

At the instant hearing, Casiano was shown a warning notice dated 8/17/10. I note that the year appears to have been altered. Casiano testified that he had never seen the warning before being shown the document 2 weeks before the instant hearing. The document is not marked as a first, second, or final warning. The writeup was for tardiness. It stated, "The assigned job yard time was 6 am, leave yard was 6:30. Ivan arrived 15 minutes late." Casiano testified that he could not have been late because the policy required him to be at the yard 15 minutes before the time for departure. If he was there at 6:15 a.m. then he was on time. The warning states that "further infractions will result in termination." The warning is dated at the bottom "8/17/81" a date which is the birthday of Ferrer, one of the signatories on the notice. Ferrer testified that he issued the warning on August 17, 2007. He also was not able to say what time Casiano actually arrived at the yard on the day in question. I shall not give any weight to this document.

Daniel Brattoli

Daniel Brattoli worked for Respondent from March 2009 until August 26, 2010. He holds a TCT certification. Brattoli testified that the employees noticed their work declining from 5 or 6 days a week to 3 or 4 days per week. Toward the end of his employment, he was working only 2 days a week. The senior men discussed their displeasure with this state of affairs. Brattoli spoke to Ladd and Ferrer many times about his lack of work. Brattoli testified that everybody was complaining. Brattoli told his fellow employees that he intended to call Daniel McClain. He spoke to McClain by telephone and complained about the situation. Brattoli told McClain he was not the only employee upset about the lack of hours. McClain said it did not sound right and that he would come up and take care of it. Brattoli reported this conversation to his fellow employees. Brattoli left two more voice mails for Daniel McClain but he received no response.

Brattoli attended the meeting on August 25 2010.[14] The men talked about how to obtain signed authorization cards and they discussed the benefits of unionization. According to Brattoli, the next morning everyone at the job knew about the meeting. No employees would sign union cards because they feared for their jobs.

On cross-examination, counsel for Respondent questioned Brattoli about a scheme in which a manager of Respondent extorted money from various company employees. Brattoli stated that before March 2010, Mark Carucci was the regional manager in Lyndhurst. One day Carucci telephoned Brattoli and told him that the company was going to drop his health insurance because he did not have enough hours. Brattoli's wife was pregnant at this time. Carucci told Brattoli that he would put a week's worth of hours on Brattoli's record and told him to check his bank account. When Brattoli asked whether this was a bonus, Carucci told Casiano it was a bonus from him. The sum was $1200. Then Carucci instructed Brattoli to take 75 percent of the sum out of the bank and pay it to him in cash. Brattoli gave the money to Carucci. Brattoli testified that Carucci was the regional manager; he knew that if he did not go along with Carucci he would lose his job and his health insurance. The exercise was repeated once more and Carucci promised it would be the last time. Brattoli did not notify anyone at the company about this scheme because he feared losing his job and his health insurance.

After Carucci's scheme was discovered he was discharged and prosecuted. Daniel McClain asked Brattoli whether he knew about the checks. The company wanted all the employees to cooperate in Carucci's prosecution. Brattoli told McClain he had received $2400 out of which he had kicked-back the sums to Carucci. Brattoli agreed that he would have the amount deducted from his wages to pay back the company. However, McClain eventually told Brattoli that he had to pay back $5100. Although this was more than he had received, Brattoli agreed to pay back this sum from his wages because it was a condition of keeping his job. By the time of the union meeting on August 25 Brattoli had paid the company all but $1900 of the $5100 amount. On August 26 the company asked Brattoli to drive a truck to Virginia. Brattoli had not received sufficient notice of this trip and he could not accept the job as he had not had adequate sleep. The trip was 12 hours down to Virginia and 12 hours back to Lyndhurst. After this day, Brattoli was called for one more job and he agreed to work, but the job was canceled. Brattoli testified that he was offered the work so that he could pay the $1900 he had promised to give the company.

Brattoli asked Ladd, Ferrer, and Pasquale why he was not getting any work after August 26. They said the reason was lack of work.

Brattoli got no more work offers from the company but he was still obligated to pay McClain $1900. He spoke to Daniel McClain and the latter agreed that if Brattoli gave him $1500 in cash they would be even. Brattoli paid the $1500 in cash but when he went to court to have the charges against him dropped, McClain said there was still a $400 balance.[15] Brattoli is now getting this sum together to pay McClain.

Brattoli testified that about 10 other employees were part of the Carucci scheme and they all had received more money than he had. He named Luke, Chuck DeCarlo, Albee Roman, Sean Alberti and Dave Melli as among those who had owed from $5000 to $12,000. Brattoli said they all remained working for the company after he received no more calls to work.

I note that Daniel McClain was present in the hearing room throughout the instant hearing and did not testify. Brattoli's testimony is uncontradicted and I credit it.

Respondent produced a written first warning issued to Brattoli for failure to report to work. No year is given in the date of the warning. Brattoli could not say for sure what year it was. At first he said he "guessed" it was 2010 but then he said he would be lying if he said he knew exactly. Respondent's witnesses did not give any year date for this warning. I shall not consider this document. Another warning was issued to Brattoli on August 16, 2010, for failure to perform a post trip inspection. It is not designated a first, second, or final warning.

[14] Brattoli does not recall dates at all well and he was unable to place events precisely in time.

[15] No details about any charges against Brattoli were entered into the record.

Brattoli testified that he refused to sign the notice because he had performed the post trip inspection at the gas station while the truck was being fueled. He protested to Daniel McClain who agreed with him and said, "That is not in the strike zone. You should not be getting a strike for doing a post trip at a gas station." Brattoli continued to be given work by the company after this incident.

C. Testimony of Management

Matthew Pasquale

Matthew Pasquale has been the regional manager in Lyndhurst since March 2010.[16] Pasquale described his job as being responsible for paperwork, timesheets, credit cards, and equipment schedules. He solicits business, prepares bids, and visits jobsites. He oversees the work of Joseph Ferrer and Alan Ladd.

Pasquale testified that Ferrer is responsible for preparing the work schedules of the Lyndhurst employees. Ferrer schedules employees based on their qualifications and experience, their ability to work at a certain work location, and considering the requirements of the particular job to which the employees are being assigned. According to Pasquale, seniority is last on the list of criteria that are considered when making job assignments.

Pasquale recalled that in mid-August 2010 Ferrer told him that work was "curtailed" and about a week later Ferrer and Ladd prepared a handwritten list of employees to be laid off.[17] On the list were Frank Bruno, Ivan Casiano, Danny Brattoli, Mike Alvarez, Jeff Hart, and Alex Martinez. Pasquale did not make changes to the list, but he made the decision to approve it. When approving the list, Pasquale did not ask Ferrer about the abilities, experience, skill, and length of service of the men on the list. Contrary to Pasquale's testimony, the evidence shows that Alex Martinez, who did not attend the union meeting, was not laid off; the company payroll records show that he worked the weeks of August 22 and 29, the weeks of September 12, 19, 26, the weeks of October 3, 10, 17, 24, and 31, the weeks of November 7, 14, and 21, and the weeks of December 5 and 12.

Pasquale testified that Bruno was on the layoff list because he had a number of accidents. Pasquale said the arrow board that was flipped over in August sustained more than minor damage and that it involved fixing not only the board itself but also a wheel and the fender. The labor cost for the repairs was between $80 and $96 but Pasquale was not sure how the arrow board was fixed. According to Pasquale, Bruno was not laid off because he was involved with the Union. Pasquale testified that team leaders are generally trusted with more responsibility by the company but he could not recall whether Bruno was a lead man. Pasquale testified that the UB truck is highly specialized equipment but he did not know that Bruno operated this piece of equipment. In fact, he did not know what kinds of equipment Bruno operated. Pasquale denied that it required skill to obtain a CDL; he added that his 16 year old daughter could get a CDL.[18]

Prior to the instant hearing Pasquale had given a sworn affidavit in which he said, "I never asked Bruno if he attended a union meeting, I never asked Bruno about any union meeting." Pasquale's affidavit states that he did not discuss the reason for the layoff with Bruno nor did he discuss the damaged arrow board. The affidavit also says that Pasquale was not aware of any other layoffs at the company.

Pasquale testified that until he spoke to Bruno in early September 2010 he was not aware of union organizing in New Jersey. While speaking to Bruno on that occasion Pasquale was not aware that Bruno was making a tape recording. However, Pasquale listened to Bruno's tape recording of their conversation after he gave his affidavit and before the instant hearing. Pasquale explained that he told Bruno the Union might have been part of the reason for the layoff because he wanted to ask Ferrer whether he knew about the Union. After speaking to Bruno, Pasquale asked Ferrer if he knew that Lyndhurst employees had attended a union meeting.

According to Pasquale, Brattoli was placed on the list to be laid off because he had a meltdown in the office on August 17 and used foul language to Ferrer in the presence of women. Pasquale was not physically present when this occurred. During the incident, Pasquale was on the phone with an employee named Marissa and he heard yelling in the background; Marissa told him that Brattoli was out of control. Pasquale asked to speak to Brattoli and told him to leave the office immediately. Brattoli was not given a warning notice or other discipline for this event. Pasquale testified that Brattoli was not laid off because of his union activities.

Pasquale testified that Casiano was on the layoff list because he had an agreement with Ladd to take over Ladd's position in the yard. Ladd told Pasquale if that agreement did not work out, Casiano would not be able to return to his former position in traffic control. In the event, Casiano did not like to work in the yard. Pasquale acknowledged that after Casiano left the yard he returned to his former duties when he was needed on a job. Pasquale denied that Casiano was laid off because he was involved with the Union.

Joseph Ferrer

Joseph Ferrer testified that he has been the project manager in Lyndhurst since June 2010. Before that he had been a TCT working on a lane closure crew. Ferrer is responsible for hiring, scheduling, customer service, and customer relations. According to Ferrer, team leaders are the more knowledgeable, more experienced, and more capable employees at the company. Not every holder of a TCT certificate is appointed a team leader.

Ferrer said that when work was "lighter" in mid-August 2010 he put together a layoff list. Ferrer consulted with Ladd in preparing the list. The two men reviewed criteria including accidents, writeups, experience, skill, availability to travel to a job, and flexibility. Seniority was not considered in choosing the employees to be laid off. Pasquale approved the list. There had not been any layoffs before August 2010.

On direct examination by counsel for Respondent, Ferrer was asked about his tape recorded conversation with Bruno. Ferrer stated that he told Bruno that Virginia had chosen him

[16] Pasquale testified that his predecessor was terminated because he was stealing from the company.

[17] This list was not produced herein.

[18] This young lady was not present in the hearing room.

for layoff because it permitted him to avoid dealing with the subject. When Ferrer told the men an action had originated in Virginia they stopped bothering Ferrer about it. Ferrer sent Pasquale an email dated September 7, 2010, following his conversation with Bruno alerting Pasquale to the fact that Bruno was very upset. Ferrer maintained that Bruno was chosen for layoff because he had more written warning notices and accidents than any other person. Concerning these warnings, Ferrer testified about the notice of May 25, 2010, and said that Bruno left the yard later than scheduled and arrived late at the job. Also on May 25 the truck was returned to the yard with tree branches on the back; it was the ultimate responsibility of the team leader to see that debris is removed from the equipment. Referring to the August 13 warning for the damaged arrow board, Ferrer stated that there was extensive monetary damage and the arrow board was out of use for about 1 week. But Ferrer acknowledged that had never seen the damaged arrow board and he wrote the warning notice using Ladd's words.

Ferrer maintained that he looked at the disciplinary records of all the employees when preparing the layoff list.

> Ferrer looked at the records of employee Gabriel Scianna who did not have a CDL. On April 1, 2009 Scianna damaged an arrow board and bumper. Ferrer knew that Scianna was written up for failure to perform a pre-trip inspection on April 1, 2009. He knew that Scianna was written up on January 15, 2010 for taking an unauthorized photo of an internal company document and showing the picture to other employees. On July 6, 2010 Scianna was cited for failing to empty a vehicle as required, the same infraction for which Casiano was warned. On August 6, 2010 Scianna committed an offense when he failed to perform a post-trip inspection and failed to fuel his vehicle before returning to the yard. Ferrer admitted that Scianna had more disciplinary notices than Bruno but he said Scianna was a traffic control supervisor and the company required him for a specific job.[19]

Respondent's records establish the following:

> Another employee with three write ups was Michael Ruas who was still employed as of March 9, 2011. Ruas did not possess a CDL. He received a first warning on March 10, 2010 for failing to file an accident report and he received a second warning on the same day for driving a company vehicle with an expired driver's license. Ruas was again written up by Ferrer on July 5, 2010 for failing to arrive at the yard at the correct time when he was the team leader on a job.[20]
>
> Employee Antonio Ruiz, who did not have a CDL, was written up on March 5, 2009 for failing to check his fuel gauge and running out of gas on the way back from a job. Ferrer gave him a warning notice with two blocks filled in on July 9, 2010 for failure to have a customer complete paperwork correctly and for being rude to his co-worker.[21]
>
> Scott Terwilliger, who did not possess a CDL, was written up on June 22, 2010 for arriving late to the yard for a job on which he was the team leader and on July 28, 2010 for failing for report to work.[22]
>
> Patrick Thornton was disciplined by Ferrer on July 6, 2010 for failing to empty his vehicle before returning to the yard, the same infraction for which Casiano and Scianna were cited.[23]
>
> Dwayne Webster was written up on August 13, 2010 by Ferrer for failing to return his vehicle full of fuel.[24]

On cross-examination, Ferrer acknowledged that Bruno was a team leader, he had a CDL, he could operate various trucks, and he could do highly skilled jobs. Bruno was one of the more experienced workers at the company. Ferrer acknowledged that Bruno had fewer disciplinary notices than some other employees.

Ferrer testified that he did not know Bruno was involved with a union when they spoke on September 7, 2010. Ferrer first heard about the union when Pasquale told him about his conversation with Bruno. Ferrer maintained that he only spoke to Ladd about the union meeting after the layoffs.

Ferrer testified that Brattoli was laid off because he stormed into the office "flipping out" and demanding to know what was going on with his work. Brattoli "startled" the young ladies in the office. According to Ferrer, the problem with this was that Brattoli should have called for permission to come in and he should not have raised his voice to Ferrer. Ferrer did not testify that Brattoli used foul language on this occasion. On direct examination by counsel for Respondent, Ferrer also cited as a reason for laying off Brattoli that he had "some write-ups" and had to be instructed in doing his job. When asked on direct examination whether Brattoli had stormed into his office before or after his layoff, Ferrer replied, "I don't remember." Ferrer further testified that he did not know how Brattoli's written warnings compared to those of other company employees.

Ferrer testified that he sent his email of August 30, 2010, warning employees "effective today, no one is allowed to come up to the office" because he did not want Brattoli coming in and flipping out. This suggests that Brattoli had confronted him that day. The date comports with Brattoli's testimony that after August 26 he asked Ferrer why he was not getting any more work. Thus, it is clear that Brattoli stormed into Ferrer's office after he was laid off.

Ferrer said Casiano was chosen for layoff because he had agreed to be a replacement for Ladd in the yard and if he didn't "abide it, we weren't going to put him back into the traffic." However, Ferrer recalled that it did not work out for Casiano in the yard but he was indeed put back into traffic. Casiano needed the hours and he held a CDL which "is what we needed at the time, good to have."

Ferrer acknowledged that after Bruno, Brattoli, and Casiano were laid off because work was slow, other employees were recalled and rehired by the company and new employees were hired. Respondent produced a list of employees showing hire date and "release date and reason." Richard Lynch was hired

[19] Scianna was laid off December 6, 2010.
[20] Ruas was still employed as of the instant hearing.
[21] Ruiz was still employed as of the instant hearing.
[22] As of the hearing Terwilliger was still employed.
[23] Thornton was laid off February 3, 2011.
[24] Webster was still employed as of the instant hearing.

on September 8, 2010, and laid off for lack of work on December 22, 2010. Angelbert Garcia was hired on September 13, 2010, and laid off for lack of work on December 6, 2010. Thomas Howard was hired on September 15, 2010, and laid off for lack of work on December 21, 2010. Massimilliano Giglio was hired on September 22, 2010, and was still working on the date of the instant hearing. Joaquin Ferrer was hired on October 28, 2010, and was still working on the date of the hearing.[25]

Ferrer testified about his August 30, 2010 email to employees which referred to telephone calls and complaints having been made to Virginia. Ferrer's note referred to Virginia and stated, "Apparently, a call may have been made down there and some complaints were made about certain things that will not be mentioned so please don't ask." However, Ferrer testified that he did not know at the time he wrote to the note that employees had called Virginia to complain. Ferrer did not explain this obvious contradiction between his testimony and the documentary evidence.

Ferrer also testified that employees complained to him about their hours of work and the fact that they were not getting enough prevailing rate shifts.

Respondent did not call Alan Ladd herein and did not show that he was unavailable to testify.

III. DISCUSSION AND CONCLUSIONS

A. Credibility of the Witnesses

I credit the testimony of Bruno. His descriptions of the various conversations with management were supported by tape recordings. He was cooperative on cross-examination and did not seek to evade any questions posed by counsel for Respondent.

I credit the testimony of Casiano. His testimony was given in a forthright manner and he was cooperative on cross-examination by counsel for Respondent. His assertions about his agreement with Ladd were not contradicted, except by hearsay evidence, as Respondent did not call Ladd to testify herein.

I credit the testimony of Brattoli. He was forthright on cross-examination and he readily gave all the details of the extortion scheme to which he was subjected by former Manager Carucci. None of his testimony was contradicted by any witness or documentary evidence.

Before he was aware of the existence of the tape recording of his conversation with Bruno, Pasquale gave an affidavit stating that he had not discussed the reason for the layoff with Bruno and had not discussed the damaged arrow board. Pasquale also denied asking Bruno whether he attended a union meeting. All of these sworn assertions are incorrect. Moreover, the inaccurate sworn statements in Pasquale's affidavit go to the heart of the issue concerning Bruno's layoff as well as the layoffs of Brattoli and Casiano. I find that Pasquale is not a reliable or credible witness and I shall not credit his testimony.

On direct examination, Ferrer maintained that Bruno was chosen for layoff because he had more warning notices than any other employees. On cross-examination, Ferrer acknowledged that Bruno had fewer disciplinary notices that some other employees. Ferrer wrote a lengthy email to employees on August 30, 2010, referencing calls to Virginia in which employees complained about certain matters. However, when questioned about the email Ferrer denied that he knew employees had called Virginia to complain. This contradiction is unexplained. I conclude that Ferrer gave shifting answers and that he was not careful in his testimony. I find that he is not a reliable witness and I shall not credit his testimony.

I also draw an adverse inference from the unexplained failure of Respondent to call Ladd to testify herein, as well as the failure to call Daniel McClain who was present in the hearing room throughout the trial.

B. Concerted Activities of the Employees

The evidence shows that numerous employees of Respondent were concerned that recently hired men were getting more work than seasoned workers and the employees expressed these concerns to management. Employees were also concerned about favoritism in the allocation of work. The record shows that senior employees discussed these concerns among themselves and then complained to Ladd in the yard. Bruno's testimony that he was present when other employees complained to Ladd establishes that the complaints were made as a group and that they expressed general dissatisfaction about the allocation of work as between senior men and new hires. Casiano's uncontradicted testimony establishes that a group of employees, including Team Leader DeCarlo, complained to Ladd that new hires were getting more prevailing rate work than senior employees and that the work was not properly compensated. Casiano's testimony establishes that DeCarlo's complaint cited senior employees as a group that was disadvantaged by the assignments; DeCarlo was not only complaining about his own job assignments. During that conversation DeCarlo wondered aloud whether the situation would be the same if there were a union on the premises, thereby confirming that the complaints were a matter of collective concern and action. Brattoli's uncontradicted testimony shows that senior employees discussed their displeasure with the decline in their hours of work. Brattoli testified that, "[e]verybody was complaining." Brattoli informed his coworkers that he was going to call Daniel McClain in Virginia. Brattoli complained to McClain about the lack of work for senior employees and he told McClain that he was not the only employee upset about the lack of hours. McClain assured Brattoli that it did not sound right and he would take care of it. Brattoli reported this conversation to his

[25] In a letter submitted August 3, 2011, counsel for Respondent objects to the reference in General Counsel's brief relating to hiring taking place after August 26, 2010. At the hearing I ruled that layoffs taking place after August 26 would not be helpful in determining whether the layoffs of Bruno, Brattoli, and Casiano on August 25 and 26 were lawful. I ruled that I would permit testimony about a history of layoffs prior to that time and indeed Respondent's witness testified that there had been no layoffs. However, no question was raised about new hires after August 25 and 26. Manifestly, hiring to replace employees allegedly laid off because work was slow is directly relevant to the issues in the case and is consistently considered in cases of this nature. However, if I were to consider layoffs after August 26, 2010, Respondent's record shows that aside from the employees at issue herein, the first layoff for lack of work took place on November 10, 2010, and there were numerous layoffs in December 2010.

fellow employees. Bruno also left a message for Daniel McClain voicing similar complaints.

Ferrer's emails addressed to all employees show that management was aware that the complaints about hours and the equitable distribution of assignments were a matter of general concern to all employees. On July 21, 2010, Ferrer acknowledged that there were numerous complaints about shifts and assignments. He told employees not to call him "about this guy doing this and that guy doing that, I need this, and I need that" a clear indication that he realized there were complaints about favoritism and unfairness. On August 30, the second email sent by Ferrer also referenced complaints made to Virginia.

The equitable distribution of their work assignments is a matter that impacts the wages and hours of all of Respondent's employees. Complaints of favoritism in making assignments, discussions among employees and bringing the matter up in meetings with management are part of an effort to change working conditions for all those affected by what they perceive as an unfair system. *Rock Valley Trucking Co.*, 350 NLRB 69, 83 (2007); *North Carolina License Plate Agency #18*, 346 NLRB 293 (2006). When the employees complained to Ladd, Ferrer, and McClain their actions were engaged in with other employees and on their collective behalves. *Myers Industries*, 268 NLRB 493, 497 (1984). It was not necessary for the employee who complained to management to be specifically authorized in a formal agency sense to act as group spokesperson for group complaints. *Herbert F. Darling, Inc.*, 287 NLRB 1356, 1360 (1988).

I find that the employees who made the complaints about work assignments were engaged in protected concerted activities.

C. Company Response to its Employees' Protected Concerted Activities

On July 21, 2010, Ferrer addressed an email to all employees acknowledging that employees were complaining about shifts and "who's doing what and getting what." With this communication management signaled to employees its awareness that they were discussing and complaining about decreased hours, fewer work assignments, and favoritism. Ferrer made it clear to the employees that their complaints had the ultimate effect of aggravating him and would result in their being taken off the schedule and not receiving any more work. Thus, Ferrer warned the employees not to call him with complaints about favoritism and decrease in hours of work on pain of losing their jobs.

Ferrer's email to employees on August 30, 2010, referred to complaints made directly to headquarters in Virginia. Ferrer told employees that if they had questions about payroll or if they had a question for him they could no longer come to the office to solve their problems, also on pain of being taken off the schedule. Ferrer implied that he had been directed to adopt this rule, thereby giving employees the impression that headquarters in Virginia had imposed the new procedure as retaliation for their concerted complaints.

I find that on July 21 and August 30, 2010, Respondent threatened its employees with loss of jobs if they continued their protected concerted activities of complaining about their work assignments. Respondent thus violated Section 8(a)(1) of the Act.

D. Antiunion Animus

As described above, Casiano heard DeCarlo complain to Ladd about the unfair distribution of prevailing rate work and the fact that such work was not being paid correctly. DeCarlo asked Ladd whether this would be going on if there were a union at the company. Ladd told DeCarlo that if the men organized the shop Daniel McClain would most likely close the Lyndhurst location and move the work to Connecticut. Respondent did not call Ladd; the testimony is uncontradicted. Ladd's statement is evidence of antiunion animus on the part of the company.

E. Layoff/Discharge of Employees

The Respondent's records designate Bruno, Casiano, and Brattoli as having been laid off for lack of work but Ferrer told Bruno that he had been ordered to give Bruno a pink slip. This term is generally used when an employer discharges an employee. The complaint alleges that the employees were discharged. The distinction between layoff and discharge is immaterial in the instant case. The evidence shows that after they attended the union meeting on August 25, 2010, the three men did not work for Respondent up to the date of the Consent Agreement approved by the District Court. I shall rely on the company documents and the testimony of Respondent's witnesses and base my decision on the evidence that the employees were laid off.

At the outset, is is clear from Ferrer's testimony and from Respondent's records that employees were recalled and hired in early and mid-September at the same time that Bruno, Casiano, and Brattoli were being told by company managers that they were laid off for lack of work. The evidence does not support Respondent's position that a layoff list was compiled for the reason that work was slowing down.

Frank Bruno

Bruno did not receive any work assignments after attending the union meeting on August 25, 2010. Ferrer told him the reason for his layoff was the equipment damage on August 13. In an extensive conversation, Bruno kept after Ferrer to explain why he was not working. Ferrer added that Bruno possessed a CDL and was held to a higher standard and Virginia had instructed him to give Bruno a pink slip. Ferrer did not reference any incidents prior to August 13 as contributing to the layoff. When Bruno confronted Ladd about being laid off for an accident which Ladd had assured him would not lead to a written warning, Ladd confirmed to Bruno that Virginia had picked employees to be laid off. Ladd gave one additional reason for Bruno's layoff. Ladd said he was sure the union did not "help it." Ladd cited the union meeting attended by "you guys," thereby showing that he knew other employees had been at the meeting. When Bruno questioned Ladd's information about the union meeting, Ladd said if it were not true then "people are lying." Ladd said he knew there was another union meeting scheduled for the next day. Bruno asked if the layoff was due to the union meeting and Ladd replied that "everything got back to Virginia." Pasquale confirmed to Bruno that he was

laid off because of his accident with the arrow board on August 13; he also said there was not a lot of work. Pasquale claimed that "it was pretty much me" who made the decision not to give Bruno any more work. When Bruno mentioned Ladd's comment about a union meeting, Pasquale asked whether Bruno had attended a union meeting and said of Bruno's attendance, "that could play into it." After Bruno asked again if he was not working because of the union meeting, Pasquale said it "might be part of it." Pasquale did not deny to Bruno that his attendance at a union meeting was one of the reasons the company was not giving Bruno any more work.

I do not credit Pasquale's testimony that Bruno was on the layoff list because he had a number of accidents. When Bruno confronted Pasquale right after the layoff Pasquale only mentioned the August 13 accident with the arrow board. His comments comport with the reasons that the other managers gave Bruno when he spoke to them right after the layoff: Ladd only mentioned the accident with the arrow board in addition to Bruno's attendance at the union meeting. Similarly, I do not credit Ferrer that Bruno was chosen for layoff because of his many prior incidents. Right after Bruno was laid off Ferrer told him he was selected because he had two strikes due to the accident with the arrow board on August 13. Ferrer never mentioned any other warning notices or incidents until he took the stand in the instant matter. I find that the mention of incidents or warnings dated before August 13 was an afterthought which was added to buttress the testimony of company witnesses.[26]

Ferrer and Ladd prepared the list of employees to be laid off. Pasquale testified that he approved it. Pasquale told Bruno that he was the one who "pretty much" decided that Bruno would not get any more work. Ladd told Bruno that the employees' attendance at the union meeting "did not help it" in connection with the decision to choose them for layoff. Ladd admitted to Bruno that his attendance at the union meeting was known at headquarters in Virginia. Ladd's comment that "you guys" attended a meeting and that "everything got back to Virginia" shows that the identities of the employees who attended the meeting were well known at the company. This comports with Brattoli's testimony that the morning after the August 25 meeting, everybody at the job knew about it. Ladd emphasized to Bruno that Virginia had selected the employees for layoff. Ferrer also told Bruno that Virginia had dictated the choice of men for layoff. At the instant hearing, Ferrer recanted this version of events and claimed that he mentioned Virginia only to stop Bruno from bothering him further. It is not necessary for purposes of this decision to decide what involvement headquarters in Virginia had when Ladd and Ferrer made up the layoff list and Pasquale approved it. It is clear that Ladd knew all about the union meeting when he helped decide who was to be laid off. I have found that Ferrer is not a reliable witness and I do not credit his statement that he did not know about the union meeting until September 7 and that he only spoke to Ladd about the union after the layoffs. Further, I have found that Pasquale is not a credible witness and I do not credit his testimony that he did not hear about the union meeting until Bruno mentioned it on September 7. Consistent with Ladd's comment that "everything got back to Virginia," I find that Respondent's managers in Lyndhurst and in Virginia were aware of the union meeting when the layoff list was compiled. Further, "Board case law is clear that the antiunion motivation of a supervisor will be imputed to the decisionmaking official, where the supervisor has direct input into the decision." *Bruce Packing Co.*, 357 NLRB 1084 (2011).

I find that a motivating factor in selecting Bruno for layoff was his attendance at the meeting with Local 210 on August 25, 2010. Based on my discussion below, I further find that Bruno would not have been laid off but for his union activity. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

I have found above that Respondent's citation of Bruno's warnings and incidents before August 13 was an afterthought and was not considered by management in compiling the layoff list. Further, in July 2010 Ladd had announced to the employees at a meeting attended by Ferrer and Pasquale, that the slate would be wiped clean and that only written warnings issued after that day would count towards discipline.[27] As for Bruno's August 13 accident with the arrow board, his testimony was that it would take 1 or 2 hours to repair the damage. Ladd was responsible for repairing the arrow board and would have provided the most expert and accurate testimony of the time and cost to make the repairs, but Respondent did not call Ladd to testify. Pasquale put the cost of the repairs between $80 and $90 but he was not sure how the board was actually fixed. Ferrer wrote the warning to Bruno stating that the arrow board had sustained "extensive monetary damage" but he admitted that he had never seen the damaged board. I conclude that the repairs to the arrow board took 1 or 2 hours and cost between $80 and $90. This is hardly the extensive monetary damage claimed by Respondent.

Comparing Bruno's warning on August 13 to that of other employees for matters arising after July 1, 2010, I find that on July 6 Gabriel Scianna failed to empty his vehicle and on August 6 he was warned for failing to perform a post-trip inspection and failing to fuel his vehicle. On July 5, 2010, Michael Ruas was written up for failing to arrive at the yard on time when he was the team leader on the job. On July 9, 2010, Antonio Ruiz was warned for failing to have the customer complete paperwork and for being rude to a coworker. Scott Terwilliger was written up on July 28 for failing to report to work. Patrick Thornton was written up on July 6, for failing to empty his vehicle. Dwayne Webster was warned on August 13 for failing to fuel his vehicle. Unlike Bruno, Scianna, Ruas, Ruiz, and Terwilliger did not possess a CDL and they were thus less skilled and useful to the company.

Pasquale admitted that when he approved the list of employees to be laid off he did not consider the abilities, experience, skill, and length of service of the men on the list. Pasquale did

[26] On direct examination, Ferrer maintained that Bruno was chosen for layoff because he had more warning notices than any other employees. However, on cross-examination, Ferrer acknowledged that Bruno had fewer disciplinary notices than some other employees.

[27] Respondent did not furnish a date for this meeting and the employee witnesses were not exact in placing this event. I shall assume that it took place on July 1.

not know that Bruno was a lead man and he did not know what kind of equipment Bruno operated. Ferrer compiled the layoff list with Ladd. Ferrer testified that Bruno had a CDL and could operate a variety of trucks and perform highly skilled jobs. According to Ferrer, Bruno was one of the more experienced men at the company and he was often designated a team leader. Ferrer said that he and Ladd reviewed criteria including accidents, writeups, experience, skill, availability to travel and flexibility. Ferrer did not testify how these criteria were applied to Bruno, except by citing Bruno's writeups and accidents. As quoted above, the handbook criteria list "company work requirements" as the first factor to be considered in a layoff, but Respondent presented no testimony that this factor was considered in Bruno's layoff. Ferrer did not say why Bruno's "abilities, experience, and skill," the second handbook factor, marked him for layoff in comparison with other employees at the company. In fact, the company witnesses acknowledged that Bruno had more experience than most of its other employees and that he was able to operate specialized equipment that required a high degree of skill. He was also frequently chosen to be a team leader. Respondent presented no evidence that it considered Bruno's "potential for reassignment," the third handbook criterion. As for "length of service," the fourth criterion listed in the handbook, the record shows that Bruno was more senior than employees who were not laid off until November or December 2010. Although the handbook requires length of service to be considered in layoffs Ferrer testified that seniority was not considered in choosing the employees to be laid off. Thus, it is clear that in deciding to lay off Bruno, Respondent did not follow the procedure set forth in the company handbook for selecting employees to be laid off.

Given the Respondent's antiunion animus, the Respondent's knowledge of Bruno's union activities, Ladd's acknowledgment to Bruno that his attendance at the union meeting did not help with respect to the layoff, the fact that Bruno was laid off immediately after the union meeting, Pasquale's statement Bruno's union activities could be part of the reason he was laid off, the weakness of Respondent's stated reasons for laying off Bruno and its failure to follow its own published procedure for layoffs, I find that Bruno would not have been chosen for layoff but for his attendance at a meeting with Local 210 on August 25, 2010. Respondent violated Section 8(a)(3) and (1) of the Act by its layoff of Bruno.

Ivan Casiano

Casiano testified that when he became Ladd's helper in the yard Ladd told him that if he did not care for the yard repair work he could go back to his TCT job on the road. After working with Ladd from April to June 2010, Casiano decided that he was not suited for the work and he returned to his old position. Ladd was not called to testify about his agreement with Casiano. I have found above that Casiano was a credible witness.

Pasquale testified that Casiano was laid off because he had an agreement to take over Ladd's position in the yard and the agreement was that Casiano could not return to his former position in traffic control. Pasquale acknowledged that after Casiano left the yard he was given work in traffic control because the company needed him. Pasquale did not explain how this squared with his assertion that Casiano would not be allowed to go back to his old job. I have found above that Pasquale was not a reliable witness and I shall not credit this testimony. Ferrer's testimony tracked that of Pasquale. He added that when Casiano was put back into traffic control it was because Casiano needed the hours and he had a CDL which was what the company needed. Ferrer did not explain how his testimony squared with his assertion that Casiano could not return to his old position. I have found that Ferrer was not a reliable witness and I do not credit his testimony about the purported agreement between Ladd and Casiano.

I find that Ladd and Casiano had agreed that Casiano could return to his old position in traffic control if he did not like the yard work. Thus, I find that the Respondent's assertion that Casiano was laid off because he did not want to continue as Ladd's helper in the yard is a pretext. I have found above that Respondent had antiunion animus and that Respondent was aware of Casiano's attendance at the meeting with Local 210 on August 25. I have quoted above Ladd's statement that the employees' attendance at the union meeting didn't help in the layoff selection and Pasquale's statement that Bruno's attendance at the union meeting could be part of the reason he was laid off. Further, Casiano was laid off immediately after he attended the union meeting. I find that Respondent selected Casiano for layoff because he attended a meeting with Local 210. Respondent thus violated Section 8(a)(3) and (1) of the Act.

Daniel Brattoli

Ferrer testified that Brattoli was laid off because he stormed into the office demanding to know what was going on with his work. According to Ferrer this "startled" the young women who worked in the office. Additionally, Ferrer cited "some writeups" and asserted that Brattoli had to be instructed about his work. Significantly, Ferrer also testified that he could not recall whether Brattoli stormed into his office before or after his layoff. And Ferrer stated that he did not know how Brattoli's written warnings compared with those of other employees who were not laid off.

As shown above, the documentary evidence shows that Ferrer issued many written warnings but Brattoli was not issued a written warning for the incident in Ferrer's office and Respondent offered no explanation for this omission. The failure to write up Brattoli for the incident in Ferrer's office confirms that it took place after Brattoli was laid off.

I have found that the incident in Ferrer's office took place after Brattoli was laid off and so it could not have been the cause of his layoff. Also as explained above, Respondent produced one undated disciplinary notice for Brattoli and I will not consider that document. According to Brattoli, the other written warning was countermanded by Daniel McClain; Respondent did not produce any testimony to contradict this assertion. Thus, there were no valid writeups outstanding against Brattoli when he was laid off. Finally, Ferrer did not offer any details about having to instruct Brattoli to do his work and I shall not credit this vague and unsubstantiated assertion.

Pasquale testified that Brattoli was laid off because he had a meltdown in the office on August 17 and used foul language in the presence of women. Pasquale was not present when this occurred. I have found above that Pasquale is not a reliable witness and I do not credit Pasquale that it took place on August 17, 2010. Further, when Brattoli asked Pasquale, Ferrer, and Ladd why he was laid off, not one of them mentioned an incident in Ferrer's office. I find that Brattoli's conduct in Ferrer's office was a pretext used by Respondent to justify Brattoli's layoff after the fact.

Based on Respondent's antiunion animus, its knowledge that Brattoli attended the meeting with Local 210 on August 25, Ladd's statement that the employees' attendance at the meeting did not help them, the fact that Brattoli was laid off immediately after the union meeting and Pasquale's statement to Bruno that his attendance at the meeting could be part of the reason he was laid off, I find that Respondent selected Brattoli for layoff because he attended a union meeting. Thus, I find that Respondent violated Section 8(a)(3) and (1) by laying off Brattoli.

F. Coercive Interrogation and Impression of Surveillance

I do not find that Bruno, Brattoli, and Casiano were open union supporters at the Lyndhurst facility. Bruno testified that a number of employees had been asked to attend the meeting but there is no evidence that this occurred at the yard. There is no evidence that the men openly discussed the Union on the job or that they expressed interest in the Union when in the presence of their supervisors or managers.

On September 7, 2010, Ladd told Bruno that he had been laid off and that going to the union meeting did not help it with respect to the layoff. Ladd told Bruno that he knew employees had attended a union meeting and he asked, "There's another one [union meeting] on the eighth, right? Tomorrow?" Ladd's statement created the impression that the employees' protected concerted activities were under surveillance.

Further, Ladd's question as to when the next meeting would be held was coercive. Bruno was loathe to admit that he attended a union meeting. The context of the conversation was a protest by Bruno that he was not being given any work; Ladd asked about the union meeting right after informing Bruno that going to a union meeting did not help him with respect to his layoff. Under all the circumstances, I find that Respondent violated Section 8(a)(1) by Ladd's coercive interrogation of Bruno. *Demco New York Corp.*, 337 NLRB 850 (2002).

On September 13, 2010, Bruno asked Pasquale why he had been laid off and Pasquale told Bruno he had selected him for layoff. When Bruno mentioned that Ladd had attributed the layoff to "some story" about attendance at a union meeting, Pasquale asked, "All right. Did you go to a union meeting?" Pasquale told Bruno that the union meeting might be part of the reason he was selected for layoff. After Bruno protested that it was not a union meeting, Pasquale asked, "What was it?" Later in the conversation, Pasquale asked about the representative at the meeting, "Was it a union guy?" Under all the circumstances, I find that Pasquale's questioning was coercive. Pasquale is the highest management representative in Lyndhurst. He was discussing Bruno's layoff and he confirmed to Bruno that attending a union meeting could be part of the reason he was laid off. Pasquale's questions, interspersed with the information that involvement with the Union could lead to loss of work, amounted to a coercive interrogation. *Demco,* supra.

CONCLUSIONS OF LAW

1. By laying off Frank Bruno, Ivan Casiano, and Daniel Brattoli because they engaged in union activities, Respondent violated Section 8(a)(3) and (1) of the Act.

2. By threatening its employees with loss of work if they complained concertedly about the distribution of work assignments, Respondent violated Section 8(a)(1) of the Act.

3. By creating the impression that its employees' union activities were under surveillance, Respondent violated Section 8(a)(1) of the Act.

4. By coercively interrogating its employees about their union activities, Respondent violated Section 8(a)(1) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily laid off employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of layoff to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons,* 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[28]

ORDER

The Respondent, McClain & Co., Inc, Lyndhurst, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting Teamsters Local 210, International Brotherhood of Teamsters, or any other union.

(b) Threatening employees with loss of work if they complain concertedly about the distribution of work assignments.

(c) Creating the impression that its employees' union activities are under surveillance.

(d) Coercively interrogating any employee about union support or union activities.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

[28] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Within 14 days from the date of the Board's Order, offer Frank Bruno, Ivan Casiano, and Daniel Brattoli full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Frank Bruno, Ivan Casiano, and Daniel Brattoli whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful layoffs, and within 3 days thereafter notify the employees in writing that this has been done and that the layoffs will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Lyndhurst, New Jersey, copies of the attached notice marked "Appendix."[29] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 21, 2010.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[29] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT select you for layoff or otherwise discriminate against any of you for supporting Teamsters Local 210, International Brotherhood of Teamsters, or any other union.

WE WILL NOT threaten you with loss of work if you complain concertedly about the distribution of work assignments.

WE WILL NOT create the impression that your union activities are under surveillance.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Frank Bruno, Ivan Casiano, and Daniel Brattoli full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Frank Bruno, Ivan Casiano, and Daniel Brattoli whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful layoffs of Frank Bruno, Ivan Casiano, and Daniel Brattoli, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the layoffs will not be used against them in any way.

MCCLAIN & CO., INC.